

blamed Eve for giving him the fruit to eat and Eve in turn said "The serpent beguiled me and I did eat". And it was only after hearing Adam and Eve in defence did God banish them from the Garden of Eden. (See *R. v. University of Cambridge*⁽⁴⁾ wherein Fortescue J., in dealing with a case where a member of the University of Cambridge was deprived of his degrees without being given an opportunity to defend himself, referred to this account of Adam and Eve as narrated in the Bible. Megarry J. also cited this case in his judgment in *John v. Rees* (*supra*) at page 307).

In the circumstances therefore I declare that the decision of the committee of the Penang Club made on May 22, 1981 suspending Mrs. Bailes from the club premises and the facilities thereof for three months is null and void and of no effect.

On the question of damages I am of the view that Mrs. Bailes is entitled to damages for the wrong done to her. It is an actionable wrong occasioned by breach of contract. As a lady associate Mrs. Bailes was "entitled to the privileges of the club" and "liable to the obligations, restrictions and penalties in force for the time being" (rule 32e). In turn the Penang Club through its committee was impliedly bound not to suspend or expel Mrs. Bailes except as provided for and in accordance with the rules of the club. But the committee of the Penang Club did not follow the rules. It disregarded the provisions of rule 63 and acted under rule 51(i) without observing the principles of natural justice.

There is nothing in law to preclude the awarding of damages for wrongful suspension or expulsion from a members' club. Support of this is to be found in the judgments of Lord MacDermott and Lord Somerville in *Bonsor v. Musicians' Union*⁽⁵⁾. See footnote 2 para 242 of *Halsbury's Laws of England* 4th edition volume 6:

"*Chamberlain v. Boyd* (1883) 11 QBD 407 at 415, CA, per Bowen LJ ("possibly the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognisance"). The grounds on which Lord MacDermott and Lord Somerville concurred in the decision of *Bonsor v. Musicians' Union* [1956] AC 104, [1955] 3 All ER 518, HL, support the view that an action for damages will lie in respect of wrongful expulsion from a members' club."

The editorial note in the report of the case of *Bonsor v. Musicians' Union* (*supra*) states that —

A "The principle that a member of an unincorporated association, when wrongfully expelled from that association, can bring an action for breach of damages against other members of the association where the wrongful expulsion amounts to a breach of contract with them, which is the ground on which Lord MacDermott and Lord Somervell of Harrow concurred in overruling the decision in *Kelly v. Assistants*, cited above, seems to be equally applicable to expulsion from unincorporated associations other than trade unions, e.g., an unincorporated members' club."

B Mrs. Bailes has been a lady associate for about 14 years. Before her suspension she went to the club almost every day and her social life revolved around the club. She is still a lady associate but she said in evidence in court that after her suspension she did not go back to the club because she felt embarrassed, anguished and upset. She now goes to other clubs. She also said that she left for Europe soon after the suspension as there was nothing for her here and her telephone kept on ringing from her friends who wanted to know why and what happened to her at the club.

C For the embarrassment, distress and humiliation which Mrs. Bailes has suffered as a result of the wrongful suspension I award her damages in the sum of \$10,000 and costs.

Claim allowed.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*

PUBLIC PROSECUTOR v. TAHIR BIN KASSIM

G [O.Cr.J. (Mohamed Dzaidin J.) July 17 to 20, 24 & 27, 1984]

[Penang - Criminal Trial No. 30 of 1982]

H Criminal Law & Procedure — Trafficking in 840.8 gms heroin — Possession — Presumption — Case against accused — Defence of no knowledge — Whether defence story reasonably true or casting any doubts on prosecution case — Sentence of life imprisonment or death — Whether circumstances extenuating — Dangerous Drugs Act, 1952, ss. 37(d), (da), (h), (g), 39B(1)(a), & 39(B)(2).

I The accused was charged in the Penang High Court with trafficking in 840.8 gms of heroin on July 28, 1982 in contravention of s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952.

Following receipt of information, the Penang police learned that the accused had 5 lb. of heroin for sale at the price of \$16,000 per lb. PW1 agreed to set a trap on July 28, 1982 whereby PW1 and an informer were to meet the accused at Bayview Hotel that afternoon. PW2 would ne-

gotiate the purchase and if successful he would bring the accused to PW2's car to show the accused cash of \$80,000 kept in the boot of the car. PW2 and the informer would return to the Hotel to await delivery of the drug by the accused. PW2 and the informer met the accused that afternoon and the accused agreed to supply 5 lb. of heroin at \$80,000, and PW2 showed him the money kept in the boot. The accused left and reappeared at about 3.15 pm. PW2 followed the accused to his car No. PAN 213 parked in front of the Hotel. The accused opened the boot of his car and closed it after a while. PW2 gave signal to PW1 by removing his hat. PW2 and the informer then left the accused who walked back to his car PAN 213. As he was about to open the door on the driver's side, PW1 approached him and identified himself, whereupon the accused ran but was apprehended with the help of other police officers. PW1 recovered five plastic packets of brownish granular substance wrapped in newspaper. PW1 then arrested the accused. The Chemist Report proved that the five packets contained a total of 2,220.9 gms. of light brown substance which contained the equivalent of 840.8 gms. of heroin. The learned Judge called for the defence of the accused.

The gist of the defence was that an antique dealer by the name of Ah Cheng told the accused to meet a European and an Indian at Bayview Hotel for some business. The accused said that it was Ah Cheng who asked him to deliver "the thing" to the Indian and the European, and Ah Cheng told the accused that "the thing" was some antique items. The accused accordingly drove car No. PAN 213 to Bayview Hotel. In substance, the accused tried to prove that he had no knowledge of the drugs and put the entire blame on Ah Cheng.

Held: (1) the accused was not a witness of truth. His story about Ah Cheng and his whereabouts could not be believed. The story that the accused was going to Bayview Hotel to meet a European and an Indian regarding the sale of some antique things and that the accused was carrying them for the fictitious Ah Cheng also could not be believed.

(2) the accused's story could not be considered to be reasonably true or consistent with his innocence. The defence had not, on the balance of probabilities, cast any doubts on the truth of the prosecution case about the negotiation for the sale of drug by the accused with PW2 resulting in his arrest on July 28, 1982 at Bayview Hotel. The accused was therefore found guilty as charged;

(3) the accused had not shown any extenuating circumstances that would justify the lighter sentence of life imprisonment. He was sentenced to death.

[Editorial note: The Dangerous Drugs (Amendment) Act, 1983 (Act A553) decreased the specification of the weight for heroin or morphine under s. 37 from 100 gms to 15 gms for the presumption to arise against any person found in possession of the drugs, and the penalty on conviction for trafficking in the dangerous drugs in excess of 15 gms is now death.]

Cases referred to:

- (1) *Syed Ali b. Syed Abdul Hamid v. Public Prosecutor* [1982] 1 M.L.J. 132.
- (2) *Leow Nghee Lim v. Reg.* [1956] M.L.J. 28.
- (3) *Director of the Public Prosecutions v. Brooks* [1974] A.C. 862.

- (4) *Public Prosecutor v. Tan Hock Hai* [1983] 1 M.L.J. 164.

CRIMINAL TRIAL.

Mohamed Bazain b. Idris (Deputy Public Prosecutor) for Public Prosecutor.
R. Rajasingam for the Accused.

Cur. Adv. Vult.

Mohamed Dzaidin J.: The accused was charged as follows:—

"That you on July 28, 1982 at about 3.15 p.m. in front of Bayview Hotel, Batu Ferringhi, in the District of Georgetown, in the State of Penang, did on your own behalf traffic in dangerous drug to wit, 840.8 grammes of heroin, in contravention of section 39B(1)(a) of the Dangerous Drug Act 1952 (Revised 1980) and that you have thereby committed an offence punishable under section 39B(2) of the said Act."

Briefly, the facts of the prosecution case were as follows. On July 27, 1982, the Police Anti-Dadah Branch in Pulau Pinang received certain information that a drug supplier in Penang had a substantial amount of heroin for disposal. On July 28, 1982, DSP Ramalingam (P.W.1) met Michael Horn (P.W.2), an undercover agent from the Drug Enforcement Administration, United States Embassy, K. Lumpur and one unnamed informer at a house at Tanjung Tokong, Pulau Pinang. At this meeting, the informer told P.W.1 that a male Malay named Tahir, the accused had five pounds of heroin for sale at the price of \$16,000/— per pound. P.W.1 agreed to set a trap. They formulated a plan whereby a transaction was to be carried out at Bayview Hotel, Batu Ferringhi the same afternoon. Both P.W. 2 and the informer were to meet Tahir at Bayview Hotel between 2.00 and 2.15 p.m. There, P.W.2 would negotiate the purchase of the drug. If the negotiation was successful, P.W. 2 and the informer would bring Tahir to P.W.2's car, which would be parked in the compound of Casuarina Hotel, to show Tahir cash of M\$80,000.00 kept in the boot of his car. P.W.2 and the informer would then return to Bayview Hotel and wait for the delivery of the drug by Tahir. When Tahir turned up at the Bayview Hotel, P.W.2 would inspect the drug and pretend to refuse taking delivery of the drug on the ground of inferior quality and to walk away from Tahir's car while removing his hat. This was a signal to P.W.1 and his officers to effect arrest.

Shortly before 2.00 p.m. on July 28, 1982

P.W.2 and the informer left for Casuarina Hotel. P.W.2 parked his car at Casuarina Hotel. Both P.W.2 and the informer walked from the Casuarina Hotel to Bayview Hotel along the beach. The accused was seated at a table outside the hotel. The informer introduced P.W.2 to the accused and after a general conversation the accused agreed to supply five pounds of heroin at M\$80,000.00 to be delivered on the same afternoon. The three of them then proceeded to Casuarina Hotel to P.W.2's car. P.W.2 opened the boot and showed the accused the money. After the accused left them, both P.W.2 and the informer returned to the same table at Bayview Hotel. At about 3.15 p.m. the accused reappeared. After a short conversation P.W.2 followed the accused to his blue Toyota car registration number PAN 213 (exhibit P11) which was parked in front of Bayview Hotel. He opened the boot of the car and after a while closed it. They then walked back to the table. P.W.1 who was in the foyer of the hotel was observing what was taking place. In the meantime, P.W.2 gave signal by removing his hat. From the table both P.W.2 and the informer left the accused who walked back to his car PAN 213. As he was about to open the door on the driver's side, P.W.1 approached him and identified himself. On seeing this, the accused ran towards the direction of the hotel swimming pool but was apprehended with the help of other police officers who were within the vicinity of the car park. P.W.1 brought him back to the car, PAN 213. P.W.1 opened the door of the car using a key which he found on the ground near the off-side of the car. He used the same key to open the boot of the car. He lifted the mat and found a brown-coloured bag at the spare tyre compartment. He inspected the content of the bag and found five plastic packets of brownish granular substance wrapped in newspaper. P.W.1 then arrested the accused. P.W.1 searched his person and recovered a bunch of keys from one of his trouser pockets. P.W.1 also recovered his N.R.I.C., driving licence and some cash. Later, P.W.1 recovered a car bearing registration number AAJ 9243 (exhibit p12) parked in a kampong area off the Batu Ferringhi main road, some distance away from the Bayview Hotel. He drove P12 back to the Police Headquarters, Georgetown. He handed the accused and the exhibits to A.S.P. Balbir Singh (P.W.3).

On July 30, 1982, A.S.P. Balbir Singh (P.W.3) sent exhibits P5A-E to the chemist for examination and received acknowledgment (exhibit P7). On August 24, 1982 at about 8.55 a.m. P.W.3 received back exhibits P5A-E together with a Chemist Report (exhibit P8). At 11.50 a.m. on the same

A day he served a copy of P8 on the accused which he acknowledged (P8A).

B The result of the analysis by the Chemist proved that the five packets (P5A to P5E) contained a total of 2220.9 grammes of light brown substance which contained the equivalent of 840.8 grammes of heroin.

Eight witnesses gave evidence for the prosecution and fourteen others were made available to the defence.

C The evidence of P.W.1 clearly established that the accused had made arrangements with P.W.2 to sell the drug. P.W.1 met P.W.2 and the informer at a house at Tanjung Tokong on July 28, 1982, where they formulated the plan to set a trap leading to the arrest of the accused at the car park of Bayview Hotel, Batu Ferringhi. P.W.1 was at the material time in the vicinity of the Bayview car-park. He was standing in the foyer of the hotel keeping a close observation of the event happening outside. The evidence of P.W.1 further established that the accused had custody or control of the drug (exhibit P5A-E) which P.W.1 recovered from the spare tyre compartment in the boot of P11. Having seen and heard P.W.1 in court, I accepted his evidence.

F The next important witness for the prosecution was P.W.2, the undercover agent. In his evidence he stated that he received information from an informer regarding the sale of five pounds of heroin at a price of M\$16,000.00 per pound. He then communicated with P.W.1. On July 28, 1982 he came to Penang to meet the accused. Arrangement was made through the informer for them to meet the accused at Bayview Hotel, Batu Ferringhi. However before the meeting, P.W.2 together with the informer met P.W.1 to discuss the plan for the negotiation and the signal to be given upon the conclusion of the transaction. Then, shortly before 2.00 p.m. on the said day, both P.W.2 and the informer left for Casuarina Hotel. P.W.2 parked his car at the parking bay of the hotel. He then walked from the hotel along the beach towards Casuarina Hotel. It was earlier agreed that the accused was to wait for them at a table outside Bayview Hotel facing the beach-side. When they reached Bayview Hotel P.W.2 noticed accused seated at one table and both he and the informer approached the table. There, P.W.2 was introduced by the informer to the accused. They had a short discussion and P.W.2 informed the accused that he was interested in getting a steady supply of heroin

in larger quantity. He stated that the accused told him he agreed to supply five pounds of heroin the same afternoon at a price of M\$80,000/-. The accused further told him that if this was agreed, he would be able to supply P.W.2 with larger quantities in future. P.W.2 then asked the accused to accompany him to his car which was parked at Casuarina Hotel to show the accused the money. When they arrived at the car, P.W.2 opened the boot and showed the accused the money. Thereafter the accused agreed with P.W.2 to get the heroin and told P.W.2 to wait for him at Bayview Hotel. Both P.W.2 and the informer returned to their table at Bayview Hotel. At about 3.15 p.m. the same afternoon, the accused joined them at the said table. The accused told P.W.2 that he had brought the heroin in his car parked at the parking lot in front of Bayview Hotel. P.W.2 followed the accused to the car (exhibit P11) to inspect the drug. The accused opened the boot of P11 and underneath a rug in the spare tyre compartment the accused showed P.W.2 five packets wrapped in newspapers. When questioned by the learned D.P.P., witness said he was unsure if these packets were in a brown bag (exhibit P2). P.W.2 opened one of these packets and took a small quantity of the drug for testing. He stripped the small content out from the packet with his fingers. He tested it with a chemical test kit which he had in his possession. The test indicated that the substance was heroin. P.W.2 then informed the accused that he was dissatisfied with the substance and he decided not to purchase it. As he proceeded from the car he gave a signal by removing the white hat which he was wearing from his head. This indicated that the heroin was in the boot of the car. He then returned to the table and together with the informer proceeded back to Casuarina Hotel. That was the last occasion he saw the accused.

The defence attacked this evidence. It was submitted that there were discrepancies between the evidence of P.W.2 with that of P.W.1 and P.W.3. P.W.2 said he went alone with the accused to the car, PAN 213 (exhibit P11) to view the substance and was not accompanied by the informer. He was unsure about seeing the brown bag (P2) at the time when he inspected the drug. While agreeing that there was discrepancy in the evidence of P.W.2, I had after considering his evidence as a whole, come to the conclusion that it was not so material as to affect his credibility. It was also not disputed that P.W.2 was an *agent provocateur*. Despite being one, whose evidence was admissible by virtue of s.40A of the Dangerous Drug Act 1952, I had no reason to disbelieve P.W.2 in the circum-

stances of this case. I accepted his entire evidence of the negotiation that took place between him and the accused at Bayview Hotel and Casuarina. In fact, P.W.2's evidence also established that the accused had possession of the drug. If there was any need for corroboration, the evidence of D.S.P. Ramalingam (P.W.1) and A.S.P. Balbir Singh (P.W.3) amply corroborated P.W.2, as both of them kept a close watch from different positions of what had transpired at Bayview Hotel before the arrest of the accused.

A.S.P. Balbir Singh (P.W.3) was one of the officers assigned to this case. Subsequently, he became the I.O. In his evidence, he stated that on July 28, 1982 at about 2.00 p.m. he went to Bayview Hotel together with Inspector Amarjit Singh and D/Sergeant Lim Tiong Guan. He dropped Sergeant Lim in front of the hotel. He parked his car behind Bayview Hotel. From there he walked towards the beach. He noticed the accused seated at a table alone. Few minutes later he saw P.W.2 and an informer walking from the direction of Casuarina along the beach towards Bayview Hotel. Both of them subsequently sat at the table where the accused was seated.

After a while he noticed the three of them walked along the beach towards the direction of Casuarina Hotel. Together with Inspector Amarjit he drove to Casuarina Hotel. From the main road, he could see P.W.2, the informer and the accused standing behind a white car parked at the parking bay of Casuarina Hotel. Then, he saw P.W.2 and the informer walking towards the beach.

At Bayview Hotel, he saw P.W.2 and the informer seated at the same table. At about 3.00 p.m. he saw motorcar PAN 213 (exhibit P11), driven by the accused entering the compound of Bayview Hotel. The accused parked his car in front of the hotel. He came out of the car and went to the table where P.W.2 and the informer were seated. After a short while, P.W.3 noticed the three of them walking to the car, P11. The accused opened the boot of the car and P.W.2 was looking into it. They then walked back to the same table. P.W.3 noticed P.W.2 giving the pre-arranged signal by taking off his hat. Then P.W.2 and the informer left the table and proceeded towards Casuarina Hotel by the beach. A short while later the accused walked back to his car, P11. P.W.3 saw P.W.1 coming out of Bayview Hotel and walked to the car. P.W.3 noticed the accused running away from P.W.1 towards the swimming pool being chased by the latter. The

accused was apprehended and was taken back to the car, P11. P.W.1 opened the boot of the car. P.W.3 was standing by his side and he saw P.W.1 removed a brown bag (exhibit P2) from the spare tyre compartment. P.W.1 opened the brown bag (P2), and P.W.3 saw five packets wrapped in newspapers in the bag. P.W.1 opened one of the packets which contained brownish substance in a plastic cover.

On the instruction of P.W.1, P.W.3 took the accused to his house at No. 204, Batu Ferringhi and conducted a search. He was accompanied by Inspector Amarjit, Inspector Lum Siew Chee and Inspector Lee Fong Kai. After the search they returned to the Police Headquarters. There, P.W.3 received from P.W.1 five packets (exhibits P5A-E) in the brown bag (exhibit P2), motorcar PAN 213 (exhibit P11), and its key (exhibit P9), motorcar AAJ 9243 (exhibit P12) and its key (exhibit P10) and a search list. P.W.1 also handed the accused to him.

The evidence of A.S.P. Balbir Singh (P.W.3) generally corroborated the evidence of P.W.1 and P.W.2. He kept a close watch of the whole operation and knew his 'target'. He was never seriously cross-examined nor discredited on the events that he saw on the material afternoon. I therefore accepted his evidence.

The last material witness for the prosecution was Mohd. Nasir bin Noordin (P.W.5) the proprietor of Nasir-Rent-A-Car at Batu Ferringhi, the seaside tourist centre. He stated in his evidence that one day in July 1982, between 8.00 – 9.00 a.m. the accused came to his shop and told him that he wanted to rent a car and he would collect it within one to two hours. P.W.5 said he prepared motorcar PAN 213 (exhibit P11) ready for rental to the accused. He discovered that the spare tyre of P11 was flat and removed it from its compartment and sent it himself to a Prangin Road shop in Georgetown. He left a message to the accused that he had taken out the spare tyre. When he returned to his shop, the car was no longer there. He saw P11 again at Batu Ferringhi Police Station.

Under cross-examination, it was suggested that the accused never approached him to rent the car and the person who gave the car was one Jasmin, P.W.5's assistant. It was further suggested that Jasmin sent the car to the accused on the instruction of a male Chinese. I had the opportunity to observe the demeanour of P.W.5. He appeared to me to be a simple witness whose evidence I had no reason to disbelieve.

Attempts were made by the prosecution to secure the attendance of Jasmin as one of their witnesses, but these were unsuccessful as his whereabouts was not known. Be that as it may, I accepted the evidence of P.W.5 that the accused hired P11 from his shop on the morning of July 28, 1982.

After the close of the prosecution case, Mr. Rajasingam submitted that the prosecution had failed to make a case for the accused to answer. He stated that there was not an iota of evidence that the accused had control and custody of the drug which the police party recovered from the boot of P11. It was also submitted that on the authority of *Syed Ali bin Syed Abdul Hamid v. Public Prosecutor*⁽¹⁾, the prosecution could not invoke any of the presumptions in s.37(d), (g), (h) and (da) of the Dangerous Drugs Act.

I was satisfied from the evidence of P.W.1 and P.W.2, that the accused had possession of the drug at the material time of his arrest by P.W.1 at the car park at Bayview Hotel. The meaning of the word "possession" was discussed in the judgment of Taylor, J., in *Leow Nghee Lim v. Reg.*⁽²⁾ where he stated at p. 31:

"The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him."

Perhaps, the most authoritative definition of "possession" in relation to dangerous drugs came from Lord Diplock in delivering the judgment of the Privy Council in *Director of Public Prosecutions v. Brooks*⁽³⁾ at p. 866:

"In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control."

On the submission of counsel that the presumption under section 37(d) and (da) did not apply in this case, on the authority of *Syed Ali's case*, I found that there was no merit in the argument. First, the facts were entirely different. In *Syed Ali's case* the vehicle was suspected of being used to carry drugs. There were few passengers when the car was stopped by the customs officers. There was a thorough search made by these officers in the presence of the accused. As a result of the search the drugs were found hidden behind

the backrest of the rear seat of the car. It was held by the Federal Court that the presumption under section 37(d) had no application because the car in which the opium was found could not be held to be "anything whatever containing" the dangerous drug. Secondly, in my opinion the presumption under paragraphs (h) and (g) of section 37 had no application to the present case because the drug was never found concealed in any compartment especially constructed for the purpose, on any vehicle or in any premises. In fact, *Syed Ali's case* was not relevant at all to the present case.

After considering the whole evidence of the prosecution witnesses I found the accused had the necessary knowledge concerning the drug so as to constitute "possession". I was satisfied at the close of the prosecution's case that the prosecution with the aid of the presumptions under section 37(d) and (da) of the Dangerous Drugs Act 1952 had made out a case against the accused which if unrebutted would warrant his conviction.

DEFENCE

The three alternatives were explained to the accused and he elected to give evidence on oath. He stated that on July 27, 1982, at about 5.00 p.m. a male Chinese, whom he knew as Ah Cheng came to look for him at the Rasa Sayang Taxistand. He knew Ah Cheng as he came daily to his place of work. Ah Cheng was an antique dealer. Ah Cheng told him that he had some work for the accused to do the next day, but the accused said he would not be free in the morning. On July 28, 1982 Ah Cheng saw him at 9.00 a.m. but he told Ah Cheng that he was not free as he had to take passengers to Bayan Lepas Airport. He told Ah Cheng that he would be back between 12 noon to 1.00 p.m. The accused returned to the Rasa Sayang taxistand from Bayan Lepas at 11.00 a.m. and waited for Ah Cheng. At 12.00 noon Ah Cheng came to the taxistand and asked the accused to follow him to a Chinese restaurant at Batu Ferringhi. The accused drove his own car. On arrival at the Chinese restaurant Ah Cheng asked the accused to park his car in the restaurant compound. Both of them sat at a table and had a discussion. According to the accused, Ah Cheng told him that he had some business with one European and an Indian. Ah Cheng asked him to go to Bayview Hotel to meet these two gentlemen. The accused agreed to go to Bayview Hotel. He arrived at the hotel at about 1.30 p.m. He sat at a table outside the hotel and ordered a glass of fresh orange. While having his drink, a European and an

A Indian approached him at the table. The Indian man asked him if he was Ah Cheng's man. When he replied "Yes" the Indian man asked him about Ah Cheng but the accused told him that Ah Cheng could not come. After a short conversation, the Indian man told him to follow him and the European to Casuarina Hotel to show the accused "the thing" that Ah Cheng wanted. On arrival at the Casuarina Hotel car park, the European opened a bag and showed the accused some cash about five to six thousand ringgit. He said the Indian man asked him to go back to get Ah Cheng. He then returned to the Chinese restaurant to inform Ah Cheng. He also informed Ah Cheng that he saw cash in the boot of the car. Then, Ah Cheng asked him to drive motorcar PAN 213 (P11) to Bayview Hotel. He asked Ah Cheng to accompany him but Ah Cheng had some work to do. Ah Cheng asked the accused to deliver "the thing" to the Indian and the European. According to the accused, Ah Cheng told him that "the thing" was some antique items. He then drove P11 to Bayview Hotel.

The accused parked P11 in front of Bayview Hotel. He came out of the car and noticed the European and the Indian seated at the same table where they met earlier. He then told the Indian that he had brought "the thing", from Ah Cheng. It was in the boot of the car. The accused stated that he gave the car key to the Indian for him to see "the thing", but the Indian insisted that he should open the boot personally. The accused then went with the European to the car and opened the boot. The European saw a bag in the boot and opened the bag to examine the contents. He was standing next to the European while the latter was examining the bag. The examination took about five minutes. After a short while they walked back to the table. According to him, the Indian told him to call Ah Cheng to let him know that the European was not happy with the goods. Both the European and the Indian then left the table.

H When he returned to the car (P11) he noticed four to five persons rushing at him. At that point of time, the accused thought they were gangsters as they did not identify themselves. He managed to push them away and fled. However, these people managed to apprehend him. He alleged that he was assaulted by them and fell to the ground. Later, they identified themselves as police officers and handcuffed him. He was taken back to the motorcar PAN 213 (P11). There, a key was recovered by P.W.1 on the ground near the car. P.W.1 took the key and opened the boot of the car. P.W.1 informed him that he was in possession of drugs but he

denied knowing anything about the drugs. He told P.W.1 that the drugs belonged to Ah Cheng and asked P.W.1 to go with him to the Chinese restaurant to see Ah Cheng, but when they arrived at the restaurant Ah Cheng was not there.

Under cross-examination the accused stated that after his arrest he took a police party to Ah Cheng's house at Kuah Sin Kheng Road, Ayer Itam. However, he could not remember who went with him. I then ordered the police officers involved in the case, who were made available by the prosecution to the defence at the close of the case for the prosecution, to be recalled for identification by the accused. The accused identified Inspector Lum Siew Chee as the officer who escorted him to the house of Ah Cheng at Kuah Sin Kheng Road, Ayer Itam. The accused stated that he was taken in a police car from Police Headquarters, Penang.

Inspector Lum (D.W.3) was then called by the defence to testify regarding the alleged visit to Kuah Sin Kheng Road. In his evidence he stated that subsequent to the arrest he took the accused to his house at No. 204, Batu Ferringhi. He did not take the accused to any other place and categorically denied that he had taken the accused to Kuah Sin Kheng Road at any time at all.

Having seen and heard the accused I did not find him to be a witness of truth. I did not believe the existence of Ah Cheng. His story about Ah Cheng was never put or suggested to the prosecution witnesses during defence's cross-examination except one question to P.W.2 about an unnamed third person which P.W.2 had stated he did not know. I also did not believe the accused's evidence regarding informing the police of the whereabouts of Ah Cheng and his assertion that after his arrest he took a police party to look for Ah Cheng at Kuah Sin Kheng Road. Here, I found the accused was deliberately lying when he identified Inspector Lum Siew Chee (D.W.3) as the officer who escorted him to Ayer Itam.

I also did not believe defence's story about going to Bayview Hotel to meet a European and an Indian regarding the sale of some antique things, and that the accused was carrying them for the fictitious Ah Cheng. I found it difficult to believe his evidence that he did not know what the European man was examining in the boot of the car when in fact he was standing close to the European. Again I found the accused was lying when he stated that he never enquired about the money when he was shown by the European at the car park of Casuarina Hotel.

A I also did not believe his story when he stated that when he arrived back to his car at Bayview Hotel compound four to five persons rushed at him and assaulted him. Upon thinking they were gangsters, he managed to push them away and fled. He stated that he was assaulted and fell to the ground. B In my opinion, this was a deliberate lie because this allegation of assault by the police was never substantiated, let alone being suggested by his counsel to either P.W.1 or P.W.3 during their cross-examination.

C In short, his defence was that he had no knowledge of the drugs and put the entire blame on the fictitious Ah Cheng.

D All in all, I did not consider the defence's story to be reasonably true or consistent with his innocence. After some due and careful consideration of his entire defence, in my judgment the said defence had not, on the balance of probabilities, cast any doubts on the truth of the prosecution's case about the negotiation for the sale of drug by the accused with P.W.2 resulting in his arrest on July 28, 1982 at Bayview Hotel, Batu Ferringhi. E Therefore, I found the accused guilty of the offence for which he was charged.

F As regards sentence, after considering the submission of Counsel and the Deputy Public Prosecutor I found that the defence had not shown any extenuating circumstances that would justify me to exercise my discretion to impose a lighter sentence of life imprisonment. In fact, Mr. Rajasingam in his submission had stated that the Federal Court had not clearly given any guideline as to what amounted to "extenuating circumstances". In *Public Prosecutor v. Tan Hock Hai*⁽⁴⁾, the accused was charged and convicted for trafficking in some 736.5 grammes of heroin. He was sentenced to imprisonment for life with whipping of ten (10) strokes. The Public Prosecutor appealed against sentence. Raja Azlan Shah, C.J. (Malaya) (as he then was) G H allowed the appeal and sentenced him to death. At page 164 he had this to say:

I "We have made clear the position with regard to sentencing on conviction for trafficking in dangerous drugs. We have said, and we say again, that the sentence of death should be imposed for trafficking in dangerous drugs other than in the most exceptional circumstances. We trust that it will not be necessary to repeat in the future our observations in this matter in *Loh Hock Seng & Anor. v. Public Prosecutor* ([1980] 2 M.L.J. 13), *Public Prosecutor v. Oo Leng Swee & Ors. v. Public Prosecutor* [1981] 1 M.L.J. 247 and *Chang Liang Sang & Ors. v. Public Prosecutor* ([1982] 2 M.L.J. 231 in perhaps even more trenchant terms or at all.

.....

In the case before us the respondent was convicted for trafficking in a large amount of heroin for a monetary motive and out of sheer greed. We find no extenuating circumstances that would justify a classification of this case as most exceptional and we therefore find no justification for the sentence of life imprisonment imposed."

In the present case the total amount of heroin involved was more than hundred grammes (100 gm.). I did not think the mitigating factors about the family of the accused *i.e.* an aged father and bedridden mother and two infant children, were extenuating circumstances. For the above reasons I sentenced the accused to death.

Sentenced accordingly.

Solicitors: *R. Rajasingam & Co.*

PUBLIC PROSECUTOR v. LEE TIN BAU

[O. Cr. J. (Gunn Chit Tuan J.) July 24 - 27, 30, August 29 & September 11, 1984]

[Selangor - Criminal Trial No. 3 of 1982]

Criminal Law and Procedure - Charges under s.57 of the Internal Security Act 1960 - Whether court has power after hearing the evidence to amend charges to charges under the Firearms (Increased Penalties) Act, 1971 and the Arms Act 1960 - Powers of Attorney-General - Federal Constitution, art. 145(3).

Administrative Law - Attorney-General - Powers of - Discretion in his capacity as Public Prosecutor to decide charges - Federal Constitution, art. 145(3).

In this case the accused was charged with offences under section 57 of the Internal Security Act, 1960. At the end of the prosecution case the learned trial judge called on the accused for his defence and after hearing his defence he found that he had not raised any reasonable doubts on the truth of the prosecution's case. Counsel for the accused requested the court to amend the charges to charges under the Firearms (Increased Penalties) Act, 1971 and the Arms Act.

Held : (1) as the law stands it must be left to the discretion of the Attorney-General in his capacity as Public Prosecutor to decide what charges to bring against anyone found in possession of firearms or ammunition and in the exercise of his discretion and in good faith, never to charge any person under Section 57(1) of the Internal Security Act whose case does not come within the legislative intent and purpose of that Act;

(2) in this case the court was satisfied beyond reasonable doubts that the accused was guilty of the offences charged and convicted him accordingly.

Cases referred to:

- (1) *Public Prosecutor v. Lau Kee Hoo* [1983] 1 M.L.J. 157, 161.

- (2) *Teh Cheng Poh v. Public Prosecutor* [1979] 1 M.L.J. 50.
- (3) *Ang Eng Chan v. Public Prosecutor* [1978] 1 M.L.J. 201.
- (4) *Re Tan Boon Liat* [1976] 2 M.L.J. 83, 85.
- (5) *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 M.L.J. 66, 71.
- (6) *Powell v. Kempton Park Race Course Company* [1899] A.C. 143, 185.
- (7) *Public Prosecutor v. Chai Yee Ken* [1977] 1 M.L.J. 167.
- (8) *Public Prosecutor v. Tan Ah Hock* Penang Criminal Trial No. 3 of 1982 (unreported).
- (9) *Connelly v. Director of Public Prosecutions* [1964] 2 All E.R. 401.
- (10) *Director of Public Prosecutions v. Humphrys* [1976] 2 All E.R. 497, 527.

CRIMINAL TRIAL.

Karpal Singh for the accused.

- D *Miss Tee Hong Geok* (Deputy Public Prosecutor) (*Miss Lee Ooi Kuan* with her) for the prosecution.

Cur. Adv. Vult.

- E **Gunn Chit Tuan J.:** The Public Prosecutor decided to prosecute one Lee Tin Bau (the accused) under the Internal Security Act, 1960 (ISA) on the following charges:-

"First Charge:

- F That you, on January 8, 1982 at about 12.20 a.m. at No. 51, Jalan SS. 18/1, Subang Jaya, in the District of Petaling Jaya, in the State of Selangor, within a security area as proclaimed by the Yang Di Pertuan Agong (vide Proclamation P.U.A. 148 of 1969 dated 15.5.1969) without lawful authority, did have in your possession, to wit two pistol revolvers SMITH AND WESSON 6 chambers .38 Special No. 77720 and RUBBER POLICE SERVICE SIX .38 Special Cal. 6 chambers without lawful excuse, and that you have thereby committed an offence punishable under Section 57(1) (a) of the Internal Security Act No. 82/60.

Second Charge:

- H That you, on January 8, 1982 at about 12.20 a.m. at No. 51, Jalan SS. 18/1, Subang Jaya, in the District of Petaling Jaya, in the State of Selangor, within a security area as proclaimed by the Yang Di Pertuan Agong (vide Proclamation P.U.A. 148 of 1969 dated 15.5.1969) without lawful authority, did have in your possession to wit, (31) rounds of ammunition without lawful excuse, and that you have thereby committed an offence punishable under Section 57(1)(b) of the Internal Security Act No. 82/60."

The prosecution adduced evidence, which was not inherently incredible, to show that on January 7, 1982 at about 10.00 p.m. a police party led by Inspector Abdullah bin Abdul Karim